

APPELLATE CIVIL.

1908
March 16.

Before Mr. Justice Aikman and M. Justice Karamat Husein.
SHER SINGH (JUDGMENT-DEBTOR) v. SRI RAM AND ANOTHER (DECREE-HOLDERS).*

Civil Procedure Code, section 286—Execution of decree—Attachment—Right to attach profits not yet due.

Held that a mere right to receive profits, the profits in question not having yet accrued due is not susceptible of attachment in execution of a decree. *Haridas Acharjia Chowdhry v. Baroda Kishore Acharjia Chowdhry* (1), *Uday Kumari Ghatwain v. Hari Ram Shaha* (2), *Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad* (3), *Jones v. Thompson* (4) and *Webb v. Stenton* (5) referred to.

IN this case Sri Ram and Ganeshi Lal, the holders of a decree against one Sher Singh, applied for the attachment of the profits which were then due to the judgment-debtor from the lambardar of the village on account of the *kharif* harvest of 1313 fasli, and also of the profits which would become due to him, but were not due at the time of the attachment, on account of the *rabi* harvest of the same year. The judgment-debtor preferred objections, but these were overruled by the Court of first instance (Subordinate Judge of Moradabad) and this decision was upheld by the District Judge. The judgment-debtor appealed to the High Court urging that the decree-holders were not entitled to attach future profits which had not at the time of the application for attachment accrued due.

Dr. Tej Bahadur Sapru, for the appellant.

Munshi Gokul Prasad (for whom Babu Sarat Chandra Chaudhri), for the respondents.

AIKMAN and KARAMAT HUSEIN, JJ.—The respondents decree-holders, in execution of a money decree which they had against the appellant, applied for the attachment of the profits which were then due to him from the lambardar of the village on account of the *kharif* harvest of 1313 Fasli, and also for the attachment of the profits which would become due to him, but

* Second Appeal No. 1213 of 1906, from a decree of D. R. Lyall, District Judge of Moradabad, dated the 29th of August 1906, confirming a decree of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 9th of June 1906.

(1) (1899) I. L. R., 27 Calc., 38.

(3) (1871) 14 Moo., I. A., 40.

(2) (1901) I. L. R., 28 Calc., 483.

(4) (1858) 27 L. J., Q. B. D., 234.

(5) (1883) 11 Q. B. D., 518.

were not due at the time of the attachment on account of the *rabi* harvest of the same year. The judgment-debtor objected. His objections were overruled by the Court of first instance, whose decision was affirmed by the learned District Judge. The judgment-debtor comes here in second appeal. The learned advocate for the appellant confines his appeal to the question as to the right to attach the *rabi* profits. In support of his appeal he relies on the cases—*Hari Das Acharjia Chowdhry v. Baroda Kishore* (1) and *Udoy Kumari Ghatwalin v. Hari Ram Shaha* (2). These cases are not exactly on all fours with the present, but there are observations in the judgments which are in favour of the appellant. Reliance is also placed on the decision of the Privy Council in *Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad* (3). We have referred to various English authorities and these too support the appellant's contention. In the case *Jones v. Thompson* (4) it was held that the mere fact that it is most probable that there will be a debt is not sufficient. There must be an actual debt. On this principle it appears—see the case *Webb v. Stenton* (5)—that the English Judges refuse to make orders attaching rent before it becomes due. In the case of the *rabi* profits here it is quite clear that there was no existing debt, there was a mere possibility that there might be money due to the judgment-debtor for profits when the accounts for the *rabi* harvest were made up. In our opinion this possible right of the judgment-debtor was not liable to attachment having regard to the provisions of section 266 of the Code of Civil Procedure. Reference was made in the course of the argument to attachment of salaries not yet due, but for these special provision is made in the section. We allow the appeal so far as it relates to the attachment of the profits of the *rabi* harvest of 1313 Fasli, and we set aside the attachment of the right to recover those profits. In other respects the appeal fails. Having regard to the result, we direct that the parties bear their own costs here and in the Courts below.

Decree modified.

(1) (1899) I. L. R., 27 Calc., 38.

(2) (1901) I. L. R., 28 Calc., 483.

(3) (1871) 14 Moo., I. A., 40.

(4) (1858) 27 L. J., Q. B. D., 234.

(5) (1888) 11 Q. B. D., 518.

1903.

SHEER SINGH

SRI RAM.

1908

March 26.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

HAKIM SINGH AND ANOTHER (JUDGMENT DEBTORS) v. RAM SINGH

- (DECREE-HOLDER).*

Act No. IV of 1882 (Transfer of Property Act), sections 88 and 89—Civil Procedure Code, section 250—Execution of decrees—Alleged payment out of Court not certified.

Applications for an order absolute for sale under section 89 of the Transfer of Property Act, 1882, are applications for the execution of the decree under section 88 of the Act. *Oudh Behari Lal v. Nageshar Lal* (1) and *Mallikarjunadu Setti v. Lingamurti Pantulu* (2) referred to. To such applications section 258 of the Code of Civil Procedure is applicable and bars the recognition of payments made out of court in pursuance of the decree unless such payments are certified to the court in the manner prescribed by that section. *Vaidhnadasamy Ayyar v. Somasundram Pillai* (3) followed. *Mullikarjuna Sastri v. Narasimha Rao* (4) and *Hatem Ali Khundkar v. Abdul Ghaffur Khan* (5) dissented from.

IN this case the respondent obtained a decree under section 88 of the Transfer of Property Act against the appellants directing them to pay a sum of money, and in default ordering that the property mortgaged to the respondent should be sold. The respondent applied for an order absolute under section 89 of the Act. The judgment-debtors pleaded that they had paid a certain sum to the decree-holder out of Court. This was denied by the decree-holder. The Court of first instance (Munsif of Farrukhabad) found the payment proved and made an order absolute for sale to recover the balance due after deduction of the amount paid out of the Court. The decree-holder appealed. He pleaded that no payment had been made to him out of Court and further that it was not open to the Court, having regard to the provisions of section 258 of the Code of Civil Procedure, to recognise the payment out of Court. Without going into the first plea the learned District Judge sustained the second plea. The judgment-debtor appealed to the High Court.

Munshi Gulzari Lal, for the appellant.

Mr. M. L. Agarwala and Babu Damodar Das, for the respondent.

* Second Appeal No. 627 of 1907, from a decree of Muhammad Ishaq Khan, District Judge of Farrukhabad, dated the 12th of March, 1907, reversing a decree of Shekhar Nath Banerji, Munsif of Farrukhabad, dated the 17th of November, 1906.

(1) (1890) I. L. R., 13 All., 278. (3) (1905) I. L. R., 28 Mad., 473.

(2) (1902) I. L. R., 25 Mad., 244. (4) (1901) I. L. R., 24 Mad., 412.

(5) (1903) 8 C. W. N., 102.

AIKMAN and KARAMAT HUSEIN, JJ.—The respondent obtained a decree under section 88 of the Transfer of Property Act against the appellants directing them to pay a sum of money, and in default ordering that the property mortgaged to the respondent should be sold. The respondent applied for an order absolute under section 89 of the Act. The judgment-debtors pleaded that they had paid a certain sum to the decree-holder out of Court. This was denied by the decree-holder. The Court of first instance found the payment proved and made an order absolute for sale to recover the balance due after deduction of the amount paid out of the Court. The decree-holder appealed. He pleaded that no payment had been made to him out of Court and further that it was not open to the Court, having regard to the provisions of section 258 of the Code of Civil Procedure to recognise the payment out of Court. Without going into the first plea the learned District Judge sustained the second plea. The judgment-debtors come here in second appeal. For the appellants it is argued that the provisions of section 258 have no application to the case. Reliance is placed upon a decision of the Madras High Court, *viz.*, *Mallikarjuna Sastri v. Narasimha Rao* (1) and on a decision of the Calcutta High Court in *Hatem Ali Khundkar v. Abdul Ghaffur Khan* (2). The former of these decisions has been overruled by a full Bench of the Madras High Court in *Vaidhina-dasamy Ayyar v. Somasundram Pillai* (3). The latter case undoubtedly supports the appellants, but, with all deference to the learned Judges who decided it, we are unable to agree with them. The Full Bench case of the Madras High Court is in point, and is against the appellants. We agree with the view taken in that case. We hold that the money alleged by the judgment-debtors to have been paid out of Court was "money payable under a decree" within the meaning of section 258 of the Code of Civil Procedure. If it was paid out of Court and the decree-holder did not certify the payment, the judgment-debtor ought to have taken prompt steps within the time allowed by the Limitation Act to have the payment recorded as certified but they failed to do so. It has been held by this Court in

1908

HAKIM
SINGH
v.
RAM SINGH.

(1) (1901) I. L. R., 24 Mad., 412. (2) (1903) 8 C. W. N., 102.

(3) (1905) I. L. R., 28 Mad., 473.

1908

HAKIM
SINGHv.
RAM SINGH.

Oudh Behari Lal v. Nageshar Lal (1) and also by the Madras High Court in *Malikarjunadu Setti v. Lingamurti Pantulu* (2) that applications for an order absolute are applications for the execution of the decree under section 88. We are of opinion that the learned Judge was right in holding that the Court was precluded by the last paragraph of section 258 of the Code of Civil Procedure from recognising the alleged payment out of Court. If the view taken by the Calcutta High Court were adopted, it seems to us that the execution of a decree might be delayed by repeated pleas of payment out of Court, and that the Court might have to try what would really be a series of different suits arising out of the original decree. We dismiss the appeal with costs.

Appeal dismissed.

1908

March 31.

Before Mr. Justice Aikman.

MOHIB-ULLAH (OBJECTOR) v. ABDUL KHALIK AND OTHERS
(DECREE-HOLDERS).*

Muhammadian law—Gift—Hiba bil mushaa—Possession.

Held that what is known to Muhammadian law as a *hiba bil mushaa*, or gift of an undivided joint property, is a valid gift if the donee obtains possession. *Muhammad Mumtaz Ahmad v. Zubaida Jan* (3) referred to.

IN this case the holders of a decree against one Wali Muhammad attached in execution thereof a certain house as belonging to their judgment-debtor. This house had belonged to Ghazi the father of Wali Muhammad. By a deed of gift executed on the 6th of April, 1906, Ghazi gave the house to his daughters-in-law Musammat Haliman and Musammat Ayesha in equal shares. Ayesha died, and her interest in the house devolved upon her son Mohib-ullah. Haliman and Mohib-ullah objected to the attachment of the house by the decree-holders. The Court of first instance (Munsif of Allahabad) disallowed Haliman's objection, but sustained that of Mohib-ullah upon the ground that Ayesha had taken possession of her share of the house. The decree-holders appealed, and the lower appellate Court

* Second Appeal No. 982 of 1907, from a decree of Udit Narain Singh, Officiating Subordinate Judge of Allahabad, dated the 9th of July 1907, reversing a decree of Mohan Lal, Munsif of Allahabad, dated the 21st of November 1906.

(1) (1890) I. L. R., 13 All., 278.

(2) (1902) I. L. R., 25 Mad., 244.

(3) (1889) I. L. R., 11 All., 460.

1908

MOHIB-
ULLAH
v.
ABDUL
KHALIK.

(Subordinate Judge) reversed the decision of the Munsif, holding that the gift, so far as it concerned Ayesha also, was invalid. Mohib-ullah appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Majid* and Babu *Durga Charan Banerji*, for the respondents.

ARKMAN, J.—The respondents attached a house as belonging to their judgment-debtor, Wali Muhammad, against whom they had obtained a decree. The house had belonged to Ghazi the father of Wali Muhammad. It is proved that Ghazi by a deed of gift executed on the 6th of April 1906, gave the house in equal shares to his daughters-in-law Musammat Haliman and Musammat Ayesha. Ayesha is dead, and the appellant Mohib-ullah is her son and heir. Musammat Haliman and Mohib-ullah objected to the attachment. Haliman's objection as to her half was overruled by the Munsif on the ground that at the time of the gift she was on a pilgrimage to Mecca and so did not get possession of the property. The learned Munsif found that Ayesha had got possession of her half share and sustained the objection of Mohib-ullah. On appeal by the decree-holders the learned Subordinate Judge found that the gift in favour of Ayesha was invalid according to Muhammadan law and overruled Mohib-ullah's objection. Mohib-ullah comes here in second appeal. The learned Subordinate Judge does not dissent from the finding that Ayesha got possession of her half, but he says that "the delivery of possession to Musammat Ayesha of the one moiety gifted away to her did not confer any right on her." The learned vakil for the appellant relies on what was said by their Lordships of the Privy Council in the case *Muhammad Mumtaz Ahmad v. Zubaida Jan* (1) at pages 474 and 475 of their judgment. Their Lordships, referring to the authorities cited by Syed Ameer Ali in his Tagore Lectures of 1884, say:—"The authorities show that possession taken under an invalid gift of *mushaa* transfers the property according to the doctrines of both Shia and Sunni Schools." They add:—"The doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society and ought to be confined within

(1) (1889) I. L. R., 11 All., 460.

1908

MOHIB-
ULLAH
v.
ABDUL
KHALIK.

the strictest rules." At page 42, Vol. I, of Ameer Ali's Muhammadan Law, 3rd edition, the author remarks:—"A *hiba bil mushaa* or gift of an undivided joint property, is not void, but only invalid, and possession remedies the defect." He goes on to cite various authorities in support of this view. The learned advocate for the respondents refers to the cases cited on page 434 of Macnaghten's Principles of Muhammadan Law and also to the opinion expressed by that author in paragraph 6, Chapter 5, page 50. It is not easy to reconcile all the authorities, but having regard to the findings of the Courts below that Ayesha did get possession of her half, and to the passage cited from the judgment of the Privy Council, I am of opinion that the appeal must succeed. I accordingly set aside the order of the Court below and restore the order of the Court of first instance. The appellant will have his costs here and in the Court below.

Appeal decreed.

1908
April 2.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

PHUL CHAND AND ANOTHER (DEFENDANTS) v. CHAND MAL, (PLAINTIFF). *
Civil Procedure Code, section 266—Execution of decrees—Attachment—Mortgage—Right of mortgagor in respect of mortgage money promised but not paid.

Where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance: he cannot sue for specific performance of the agreement to lend the full sum promised, and the non-payment of a portion of the loan does not constitute a debt which can be the subject of attachment and sale under section 266 of the Code of Civil Procedure. *The South African Territories Company, Limited v. Wallington* (1) referred to.

THE facts of this case are as follows. On the 18th of April 1903 one Sheo Ram and another executed two mortgages in favour of the defendants Phul Chand and Gulab Chand to secure the principal sums of Rs. 1,000 and Rs. 6,000 respectively. It has been found that only Rs. 2,135-11 were paid by the mortgagees and that the remainder is unpaid. Some creditors of the

* First Appeal No. 198 of 1906, from a decree of Parmatha Nath Banerji, Subordinate Judge of Jhansi, dated the 28th of May 1906.

mortgagors obtained a money decree against them and in execution of that decree proceeded to attach what they described as the right of the mortgagors to receive the balance of the mortgage money and put this up for sale. This so-called right was purchased by the plaintiff on the 25th of November 1903. The suit out of which this appeal has arisen was then instituted by the plaintiff against the mortgagees for recovery of the amount alleged to be due by them and a decree for portion of the amount claimed was passed in favour of the plaintiff. The mortgagees thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the respondent.

STANLEY, C. J., and BURKITT, J. —The question involved in this appeal is one out of the ordinary course. On the 18th of April 1903 one Sheo Ram and another executed two mortgages in favour of the defendants Phul Chand and Gulab Chand to secure the principal sums of Rs. 1,000 and Rs. 6,000 respectively. It has been found that only Rs. 2,135-11 were paid by the mortgagees and that the remainder is unpaid. Some creditors of the mortgagors obtained a money decree against them and in execution of that decree proceeded to attach what they described as the right of the mortgagors to receive the balance of the mortgage money and put this up for sale. This so-called right was purchased by the plaintiff on the 25th of November 1903. The suit out of which this appeal has arisen was then instituted by the plaintiff against the mortgagees for recovery of the amount alleged to be due by them and a decree for portion of the amount claimed was passed in favour of the plaintiff. The present appeal was then preferred, and the main ground of appeal is that there was no debt due by the mortgagees to the mortgagors which could be attached within the meaning of section 266 of the Code of Civil Procedure; that the promises of the mortgagees to lend the amounts mentioned in the mortgage-deeds did not constitute debts which could be attached, and that the only remedy, if any, of the mortgagors against their mortgagees was a suit for damages for breach of contract, if any damages could be proved.

1908

PHUL CHAND
•
CHAND MAL.

1908

PHUL CHAND
J. V.
CHAND MAL.

The question is not free from difficulty, but it appears to us that a decision of the House of Lords, which was brought to our notice by the learned advocate for the respondents, must be taken by us to be conclusive on the point. This is the case of *The South African Territories Company, Limited v. Wallington* (1). The facts of that case were shortly as follows. The plaintiff Company issued sixteen debentures to the defendant Wallington on his undertaking to pay the face value of the debentures by instalments. Wallington paid some of the early instalments, but failed to pay the balance, and thereupon a suit was instituted against him for specific performance of his agreement or for damages. Wright, J., before whom the trial took place, held that the claim for specific performance could not be sustained, but gave judgment for the plaintiff Company for damages on the ground that a debt had been created by the defendant's promise to pay, contained in his letter of application for the debentures. Judgment was entered for the plaintiffs for £520, the amount of the instalments due and unpaid up to the date of the writ, and costs. An appeal was preferred, which was heard by Lord Esher, M. R., and Lopes and Chitty, L. J. J., who reversed the decision of the Court below and entered up judgment for the defendant. An appeal was preferred to the House of Lords, with the result that the decision of the Court of Appeal was upheld. Their Lordships held that on the default of Wallington to make the payments which he had undertaken to pay, the moneys remaining due by him for unpaid instalments did not constitute a debt to the Company; that the Company was only entitled to damages for actual loss caused by the breach of contract. Lord Halsbury, L. C., in his judgment, with respect to the claim for specific performance, remarked that "a long and uniform course of decision has prevented the application of any such remedy, and I do not understand that any Court or any member of any Court has entertained a doubt but that the refusal of the learned Judge below to grant a decree for specific performance was perfectly right. But of course in this, like any other contract, one party to the contract has a right to complain that the other party has broken it, and if he establishes that proposition he

(1) [1898] A. C., 309

1908

PHUL CHAND
v.
CHAND MAL.

is entitled to such damages as are appropriate to the nature of the contract." Lord Watson in the course of his judgment observed that "the only engagement made by the respondent with the Company consisted in a promise to advance money to them in loan; and it is settled in the law of England that such a promise cannot sustain a suit for specific performance," and later on he says:—"The only remedy open to the Company was by action against the respondent for any loss or damage which they might sustain through his breach of promise." The other Lords endorsed this view, namely, that no suit will lie to compel a party to fulfil an agreement to advance money. This decision is in entire accord with the view which we expressed at an early stage of the hearing and carrying the weight which it necessarily does, must conclude this appeal. The mortgagees were never in a position to enforce specific performance of the agreement of the mortgagees to advance the full sum agreed to be lent by them. The unpaid portion of the loan did not constitute a debt due by them to the mortgagors such as could be attached under the Code of Civil Procedure. It may be that the mortgagors have some ground of complaint against the mortgagees, and they may be in a position to obtain damages for the breach by the mortgagees of their contract, but this matter is not before us and we express no opinion upon it. We merely hold that the plaintiff has no cause of action against the mortgagees. We allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs in both Courts.*

Appeal decreed.

* [Cf. *Sher Singh v. Sri Ram*, *Supra* p. 246—Ed.]

1908
April 4.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.
RAM PRASAD AND OTHERS (DEFENDANTS) v. MAN MOH AN AND
OTHERS (PLAINTIFFS)*

Hindu law—Joint Hindu family—Foreclosure of mortgage—Sons not made parties—Right of sons to redeem—Act No. IV of 1832 (Transfer of Property Act), section 85.

The mortgagees of a mortgage of joint family property executed by the father alone sued for and obtained a decree for foreclosure. At the time the suit was instituted the mortgagees knew that there were sons and grandson jointly interested with the mortgagor in the mortgaged property, but, notwithstanding this, they omitted to make them parties to their suit.

Held that the sons and grandsons were not precluded from instituting a suit for redemption. *Bhawani Prasad v. Kallu* (1) referred to. *Debi Singh v. Jia Ram* (2) distinguished.

In this case certain mortgagees obtained a decree for foreclosure of a mortgage held by them against one Phul Singh who was the father of some of the plaintiffs and grandfather of the others. The mortgagees, notwithstanding that they were aware of the existence of the plaintiffs and of their interest in the mortgaged property, omitted to make them parties to their suit for foreclosure. The plaintiffs then instituted the present suit, admitting their liability to satisfy the debt incurred by the mortgagor, but asking to be given an opportunity to redeem the mortgage. The Court of first instance (Munsif of Lalitpur) held that the suit was not maintainable and accordingly dismissed it. On appeal the lower appellate Court (District Judge of Jhansi) reversed the decision of the Munsif and remanded the suit under section 562, of the Code of Civil Procedure. Against this order of remand the mortgagees defendants appealed to the High Court.

Dr. Satish Chandra Banerji (for whom *Babu Sarat Chandra Chaudhri*) and *Munshi Deokinandan*, for the appellants.

Mr. E. A. Howard and *Babu Durga Charan Banerji*, for the respondents.

AIKMAN and KARAMAT HUSEIN, JJ.—The appellants obtained a decree for foreclosure against one Phul Singh, who is father of some of the respondents and grandfather of the others. It is found that, although the appellants had notice of the interests of

* First Appeal No. 88 of 1907, from an order of H. E. Holme, District Judge of Jhansi, dated the 4th of July 1907.

(1) (1895) I. L. R., 17 All., 537. (2) (1902) I. L. R., 25 All., 214.

the sons and grandsons, they did not implead them in the suit for foreclosure. The respondents brought the suit out of which this appeal arises asking to be given an opportunity to redeem the mortgage. They did not dispute their liability to satisfy the debt incurred by the mortgagor. The Court of first instance held that the suit was not maintainable. On appeal the learned District Judge held that it was, and sent the case back for decision on the merits. The present appeal has been preferred against this order of remand.

It is contended that we ought to apply to this case the principle of the ruling of the Full Bench in *Debi Singh v. Jia Ram* (1). That was a case in which the sons of a Hindu father sued to get back from innocent purchasers their share of the family estate, which had been sold in execution of a decree obtained upon a mortgage by their father in a suit to which they were no parties. Their claim was based solely on the ground that they had not been parties to the suit, in which the decree was obtained. In the judgment of the learned Chief Justice in that case, which was concurred in by Knox, J., stress is repeatedly laid on the fact that the plaintiffs wished to oust strangers—see pages 233, 225, and particularly 226, of the judgment. In this case all that the plaintiffs ask is that they should be given an opportunity to redeem the mortgage which was foreclosed by the appellants, who knew of the plaintiffs' interest and yet did not make them parties to the suit to foreclose. In our opinion we should not be justified in extending the principle laid down in the case relied on behalf of the appellants to the present case. It was owing to the appellants' failure to comply with the provision of law that the respondents did not have an opportunity to redeem. In our opinion the observations of Banerji, J., in the Full Bench case, *Bhawani Prasad v. Kallu* (2), at page 548 of the judgment, and the observations of Edge, C.J., at page 562 and following pages are distinctly in favour of the view taken by the learned District Judge. The judgment of the Chief Justice in that case was concurred in by three other Judges who took part in deciding the case. In our opinion the appeal fails, and it is dismissed with costs.

Appeal dismissed.

(1) (1902) I. L. R., 25 All., 214. (2) (1895) I. L. R., 17 All., 537.